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No. 90-80

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD M. PENTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether pre-indictment statements to federal investigators, made by petitioner after he was informed that no promises were being offered in exchange for the statements and that any decision to provide information would have to be voluntary, were given "in the course of plea discussions" and hence were inadmissible under Rule 11(e)(6)(D) of the Federal Rules of Criminal Procedure.

2. Whether time required for the government to arrange for imprisoned witnesses in one location to attend a trial in another location is subject to exclusion under the Speedy Trial Act, which excludes "[a]ny period of delay resulting from the absence or unavailability of * * * an essential witness."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 898 F.2d 815. The opinions of the district court (Pet. App. B1-B26 and C1-C8) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1990. A timely petition for rehearing was deneid on April 11, 1990 (Pet. App. D1-D2). The petition for a writ of certiorari was filed on July 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted by a federal grand jury in 1988 on multiple counts of odometer tampering and title washing.[1] Petitioner eventually entered a conditional guilty plea, reserving his right to contest specified pretrial rulings by the district court. Petitioner is now challenging two pretrial rulings, both of which were affirmed on appeal: first, the denial of a motion by petitioner to suppress statements given to federal investigators before his indictment, and second, the partial granting of a motion by the government for a continuance.

1. In early 1985, the Justice Department and the Federal Bureau of Investigation undertook a criminal investigation of odometer tampering and title-washing activities in the Northeast. Pet. App. B2. The investigation was directed by Don Burley, an attorney with the Justice Department's Office of Consumer Litigation. In the course of the investigation, Burley contacted petitioner, who was then the general manager of a wholesale auto auction in Massachusetts. *Ibid.* Burley approached petitioner to seek information about suspicious transactions at petitioner's dealership and to pursue evidence that petitioner had participated in or knew of title washing activities in New Jersey. *Ibid.* Between April 1985 and May 1987, Burley and other federal investigators held a number of conversations with petitioner, pursuant to which petitioner provided information and documents relating to the investigation. *Id.* at B2-B6.

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[1] Descriptions of representative odometer tampering and title washing schemes can be found in *United States* v. *Henson*, 848 F.2d 1374, 1376-1378 (6th Cir. 1988), and *United States* v. *Cotoia*, 785 F.2d 497, 498-500 (4th Cir. 1986).

In February 1988, nine months after petitioner's last discussion with the federal investigators, a grand jury returned indictments against petitioner and five co-defendants. Several months later, petitioner filed a motion to suppress his pre-indictment statements to the investigators. In that motion, petitioner claimed that the statements he made during his last two meetings with the investigators, one in April 1987 and the other in May 1987, were subject to suppression under Rule 11(e)(6)(D) of the Federal Rules of Criminal Procedure, which provides that statements "made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn" are inadmissible at trial.

The district court referred petitioner's suppression motion to a magistrate for an evidentiary hearing. At the hearing, the government presented testimony by Burley and FBI Agent James Scripture, who had joined Burley in the 1987 meetings. Petitioner chose not to testify at the hearing, relying instead on an affidavit.

Burley testified that by the time of the April 1987 and May 1987 meetings, he had concluded that petitioner had not been forthright in his previous dealings with him and that petitioner had tried to conceal his own involvement in odometer tampering and title washing activities. C.A. App. 117-118 (petitioner "had essentially sandbagged us"). Burley told petitioner that he believed that petitioner "knew more than he was letting on" and was more deeply involved than he had indicated. *Id.* at 118. Burley testified that he and Scripture encouraged petitioner to "think about cooperating and telling us everything that had really happened, * * * truthfully, candidly and completely." *Id.* at 119.

Burley and Scripture testified that before volunteering information, petitioner asked for assurances about what would happen to him if he provided further information. C.A. App. 61-62, 118-126, 135-137, 146. Burley and Scripture testified that each time those requests were made, they were rejected. Burley told petitioner repeatedly that no promises would be made in connection with petitioner's cooperation and that "anything [petitioner] offered us * * * was going to have to be voluntary." *Id.* at 61-62, 114, 125-126, 146; see Pet. App. B5. Burley and Scripture testified that at no point during the conversations was petitioner promised that his statements would not be used against him. C.A. App. 62, 67, 126; Pet. App. B7.

By the time of the 1987 meetings, Burley expected that petitioner ultimately would be prosecuted and would plead guilty, an expectation that petitioner himself may have shared. C.A. App. 137. None of the participants in the 1987 meetings, however, discussed the possibility of petitioner's entering a plea. Nor did Burley offer any assurances regarding the charges that might be pursued or the sentence that might be recommended in connection with a plea. Pet. App. B6-B7. Burley simply told petitioner that petitioner's cooperation, if provided, would be "taken into account" by the government. C.A. App. 135-137, 147; Pet. App. B5-B6.

Following the hearing, the magistrate issued a report recommending that petitioner's suppression motion be denied. C.A. App. 172-181. The magistrate found, *inter alia*, that petitioner was repeatedly told that no promises were being made and that "at most" his cooperation would be made known to the district court if and when he was prosecuted. *Id.* at 176-177, 178. After reviewing the record of the suppression

hearing and considering petitioner's claim *de novo*, the district court agreed with the magistrate's conclusion that petitioner had not been engaged in "plea discussions" for purposes of Rule 11(e)(6)(D). Pet. App. B8-B18. The district court found that Burley "was acting in an investigative role while questioning [petitioner]" and that Burley's intent "was not to negotiate a plea, but to further his investigation by seeking truthful information from [petitioner]." *Id.* at B15, B17. The district court found that "even if [petitioner] subjectively believed that plea discussions were occurring, * * * such a belief was objectively unreasonable" under the circumstances. *Id.* at B16.

2. In May 1989, petitioner and his co-defendants moved to dismiss their indictments under the Speedy Trial Act, 18 U.S.C. 3161 *et seq.* The Speedy Trial Act requires that a defendant's trial commence within 70 days after the filing of the indictment or the defendant's first appearance before a judicial officer. 18 U.S.C. 3161(c)(1). The Act excludes certain periods of delay when computing the time within which the defendant must be brought to trial. 18 U.S.C. 3161(h)(1)-(9). Petitioner and his co-defendants contended that more than 200 non-excludable days had passed since their arraignments in 1988.

The government opposed the Speedy Trial Act motion and filed a cross-motion to continue the trial date. In support of its motion for a continuance, the government advised the district court, *inter alia*, that several essential witnesses were in prison in other locations and that a period of delay was required to arrange for their attendance at the trial.

On June 7, 1989, the district court denied the defendants' Speedy Trial Act motion, ruling that all but 48 days of the pre-trial delay was subject to

exclusion. Pet. App. C1-C6. At the same time, the district court continued the trial date to June 26, 1989. *Id.* at C7. The court ruled that the government "legitimately seeks three weeks of lead time because some of its essential witnesses are in prison and unavailable" and held that the resulting delay was excludable under the Speedy Trial Act. *Ibid.* Although the district court clearly intended to rely on 18 U.S.C. 3161(h)(3), which excludes "[a]ny period of delay resulting from the absence or unavailability of * * * an essential witness," [2] the court inadvertently cited the preceding subsection, 18 U.S.C. 3161(h)(2), which concerns certain consensual delays and which concededly has no application to this case. Pet. App. C7.

3. Shortly after his trial began, petitioner entered a conditional guilty plea under Rule 11(a)(2) of the Federal Rules of Criminal Procedure. Rule 11(a)(2) permits a defendant, with the agreement of the prosecution and the court, to enter a conditional plea that reserves the defendant's right to seek appellate review of specified pretrial rulings and to withdraw his plea if the appeal is successful. Petitioner thereafter appealed, challenging several of the district court's pretrial orders.

The court of appeals affirmed petitioner's conviction. Pet. App. A1-A17. The principal issue raised by petitioner on appeal was whether his pre-indictment statements had been given "in the course of plea discussions" under Rule 11(e)(6)(D). The

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[2] 18 U.S.C. 3161(h)(3)(B) provides that "an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial."

court of appeals agreed with the district court that no plea discussions had taken place. Although the record suggested that petitioner might have been interested in avoiding prosecution, or at least avoiding a substantial sentence, the court of appeals pointed out that at the time he made his statements petitioner "made no such request, and the [government] attorney made no offer." Pet. App. A6. To the contrary, the record shows that when petitioner asked Burley "[w]hat is going to happen to me" if he provided information, he was told that "I'm not going to promise you anything," that "[n]o promise would be made," and that any decision to provide information was "solely his decision, voluntary, one hundred percent on his part." *Id.* at A6-A7. The court of appeals reasoned that the term "plea discussions" in Rule 11(e)(6)(D) "means plea discussions, and not simply anything that might ultimately lead to such [discussions]." Pet. App. A9; see also *id.* at A15 ("plea discussions means plea discussions."). The court of appeals declined to adopt a broad formula for identifying "plea discussions" under Rule 11(e)(6)(D), choosing instead to follow the practice of "[m]ost courts [which] have simply applied the plain language of the rule to the facts before them." Pet. App. A13-A14.

Petitioner also challenged the district court's ruling that the 19-day trial continuance was excluded from the time limit of the Speedy Trial Act. Petitioner's challenge to that ruling was a narrow one. Petitioner did not dispute that 18 U.S.C. 3161(h)(3), which excludes delay resulting from the unavailability of essential witnesses, was applicable. Instead, relying on the district court's accidental citation of the Act's preceding subsection, petitioner argued only that the subsection mistakenly cited by

the district court "has no application to the instant case," and that the exclusion was therefore unlawful. Pet. C.A. Br. 36; see Pet. 31-32 (summarizing argument). The court of appeals dismissed this argument summarily, holding that "where the government showed that the * * * period was due to the 'absence or unavailability of . . . an essential witness,' within [18 U.S.C.] § 3161(h)(3), the [district] court's citing the wrong subsection in so finding was a mere clerical mistake, and this exclusion was proper." Pet. App. A17.[3]

ARGUMENT

1. The court of appeals was correct in concluding that petitioner's pre-indictment statements were not made "in the course of plea discussions" for purposes of Rule 11(e)(6)(D). The record in this case, as summarized by the court of appeals (Pet. App. A5-A7) and reviewed in greater detail by the district court (*id.* at B2-B8), makes plain that petitioner and the federal investigators never engaged in plea discussions in the meetings in April and May 1987. Whether or not petitioner wished to initiate plea discussions, he never did so, and his elliptical inquiries about "[w]hat is going to happen to me" (Pet. App. A6) were consistently met with the response that no deals were going to be offered and that any decision to provide information would have to be a voluntary one. See Pet. App. B5-B6. At most, as the district court noted, petitioner "was told that it was

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[3] The court of appeals held that the district court had erred in its treatment of an unrelated element of petitioner's Speedy Trial Act claim, but correction of the error did not extend the pre-trial delay beyond the Act's 70-day limit. See Pet. App. A16-A17.

in his best interest to cooperate and that his cooperation would be brought to the attention of the judge." *Id.* at B18-B19. Other courts of appeals have likewise held that this kind of assurance, designed to elicit information rather than to pursue a plea agreement, does not transform an investigative meeting into a plea discussion. See, *e.g.*, *United States* v. *Leon Guerrero*, 847 F.2d 1363, 1368 (9th Cir. 1988); *United States* v. *Posey*, 611 F.2d 1389, 1390 (5th Cir. 1980).[4]

Despite petitioner's claim to the contrary, there is no conflict between the decision in this case and the Second Circuit's decision in *United States* v. *Serna*, 799 F.2d 842 (1986), cert. denied, 481 U.S. 1013 (1987). Although the court of appeals in this case was concerned that *Serna* might embody a general rule that any "preliminary discussion" (Pet. App. A15) must be treated as plea bargaining under Rule 11(e)(6)(D), *Serna* in fact held only that the preliminary discussion in that case had to be regarded "as part of the overall plea bargaining process." *Serna*, 799 F.2d at 849. Far from adopting a general rule, the Second Circuit held that "[w]hether a party is engaged in plea discussions is a factual question that must be determined on a case-by-case basis." *Id.* at 848. Accordingly, the Second Circuit's approach in *Serna* is not at odds with the approach employed by the court of appeals in this case. The

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[4] Petitioner mischaracterizes the court of appeals' opinion as holding that "unless the discussions [between a potential defendant and government investigators] culminate in a specific agreement, the statements can be used as evidence." Pet. 25-26. Petitioner does not identify any language in the court's ~~of appeals~~ opinion reaching that conclusion, and we can find none.

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difference in outcomes simply reflects the different facts before the two courts.[5]

Petitioner's invocation of *United States* v. *Grant*, 622 F.2d 308 (8th Cir. 1980), and *United States* v. *Jorgensen*, 871 F.2d 725 (8th Cir. 1989), is also misconceived. In *Grant*, the statements held to be excludable under Rule 11(e)(6)(D) were given only after "an offer to plead to a one count indictment was extended [by the government] to appellee during the preindictment interviews." 622 F.2d at 312. And in *Jorgensen*, the court held that the defendant had *not* engaged in plea discussions and therefore was not entitled to exclude his statements under Rule 11(e)(6)(D). Neither decision offers any support for petitioner's claim.

Finally, there is no merit to petitioner's assertion (Pet. 27-29) that the court of appeals' decision is contrary to the legislative history of Rule 11(e)(6)(D). Petitioner relies on a passage from the Advisory Committee's Note which states that "even an attempt to open up plea bargaining is covered under the same rule of inadmissibility." 18 U.S.C. App. at 728-729. See Pet. 29. In this case, however, the record before the court of appeals shows that petitioner

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[5] In *Serna*, the discussions bore a far closer resemblance to explicit plea bargaining. A defendant and his attorney met with a government prosecutor and two DEA agents, prior to trial but evidently well after the defendant's indictment, "to discuss the possibility of [the defendant's] cooperation with the Government." 799 F.2d at 848. During the course of the meeting, "[g]eneral guidelines were discussed." *Ibid.* Among other things, the prosecutor assured the defendant that any information he gave "would not be used against him" (*ibid.*), an assurance that petitioner was not offered in this case.

did not make the statements at issue until he had been told that the federal investigators were not prepared to engage in plea discussions and that any statements he chose to make would have to be voluntary. See Pet. App. B4-B8; C.A. App. 62, 114, 125-126. Accordingly, this is not a case in which a potential defendant offers information to the government in an effort to "open plea bargaining," as contemplated by the Advisory Committee's Note (18 U.S.C. App. at 728-729), but rather one in which the defendant speaks with knowledge that plea discussions are not being conducted. Nothing in the legislative history of Rule 11(e)(6) suggests that the rule was intended to exclude statements made in such circumstances.

2. Petitioner's second claim concerns the district court's decision to continue the trial date for 19 days to allow the government to arrange for the transportation of essential witnesses who were imprisoned in other locations. As noted above, the district court held the delay to be excludable under the Speedy Trial Act. Petitioner evidently is not contending that the period of delay allowed by the district court was too long to be subject to exclusion. Instead, he seems to contend that *any* period of delay involved in the transportation of imprisoned witnesses is *ipso facto* non-excludable under the Act. Specifically, petitioner appears to argue (Pet. 33) that a federal prisoner can never be "unavailable," as that term is defined in 18 U.S.C. 3161(h)(3), and hence that the delay involved in arranging for the prisoner's attendance as a witness at trial can never qualify as a "period of delay resulting from the absence or unavailability of * * * an essential witness." *Ibid.*

Assuming *arguendo* that petitioner has preserved his right to raise this claim,[6] the claim is inconsistent with the terms of the Speedy Trial Act. The Act provides that "a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence * * *." 18 U.S.C. 3161 (h)(3)(B). It is unquestionably true that through the exercise of "due diligence," witnesses imprisoned in one location eventually can be brought to another location to testify. But even when due diligence is employed, some element of delay is unavoidable. And during that period of delay, the witness is plainly "unavailable" within the meaning of the Act, for the Act deems a witness to be unavailable *"whenever* * * * his presence for trial cannot be obtained by due diligence" (emphasis added). As long as due diligence is employed, any delay attendant on the transportation of an imprisoned witness is thus clearly subject to exclusion under Section 3161(h)(3).

The Ninth Circuit's decision in *United States* v. *Taylor*, 821 F.2d 1377 (1987), rev'd on other grounds, 487 U.S. 326 (1988), in no way supports the contrary rule advanced by petitioner. Petitioner

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[6] In his brief before the court of appeals, petitioner did not contest the applicability of 18 U.S.C. 3161(h)(3). Instead, he argued only that the delay was not subject to exclusion under 18 U.S.C. 3161(h)(2), the provision inadvertently cited by the district court. Petitioner made no reference to Section 3161(h)(3) until his rehearing petition, which the court of appeals summarily denied. If the court of appeals' ultimate reliance on Section 3161(h)(3) had been unforeseeable, petitioner's previous failure to address that provision might be excusable. But the government squarely invoked Section 3161(h)(3) in its appellate brief, and petitioner simply chose not to respond until the rehearing stage.

interprets *Taylor* (Pet. 34-35) as holding that a person in federal custody is always "available" and hence that any delay occasioned by his transfer to the trial venue is non-excludable for Speedy Trial Act purposes. But *Taylor* stands for a considerably narrower proposition: the prisoner in *Taylor* was deemed to have been "available" not simply because he was in federal custody but because the government "failed to bring him promptly before a federal magistrate to initiate removal proceedings" (821 F.2d at 1385) and because the government delayed his transfer to accommodate the transfer of other prisoners. *Id.* at 1384. Thus, even assuming that *Taylor* was correctly decided, it does not establish the broad rule invoked by petitioner, nor does it conflict with the court of appeals' decision here.

Once it is acknowledged that *some* period of delay relating to the transportation of imprisoned witnesses may be excluded under 18 U.S.C. 3161(h)(3), the only issues that remain in an individual case are whether "due diligence" has in fact been exercised and whether the full period of delay at issue was required under the circumstances of the case. Petitioner does not appear to contest the answers given to those questions by the courts below, which in any event involve fact-bound inquiries that are inappropriate subjects for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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